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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 624

EARLE C. MOODY, ET AL., *Appellants,*

v.

RICHMOND M. FLOWERS, ET AL., *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

REPLY OF APPELLANTS TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

A Three-Judge Court Was Properly Convened

The Solicitor General in his recently filed Amicus Brief has suggested that it would "appear" a three-judge statutory court was improperly convened in this case. (Brief p. 128) We disagree.

The statute here attacked is part of the statutory scheme of malapportionment for county government in Alabama. When one looks at the substance rather than form of Alabama law for counties, this statute is revealed as part of a state-wide policy to malapportion all Alabama counties similarly situated (i.e., all counties in which a city of con-

sequence is located) so as to insure rural control of the governing boards of each such county. This state-wide policy of Alabama is embodied in the Act here attacked and in other Alabama laws weaving similar "crazy quilts" for counties similarly situated.[1] *Baker* v. *Carr*, 369 U.S. 186, 254; *Reynolds* v. *Sims*, 377 U.S. 533, 570. The form varies only to the extent of so arranging the beats, precincts and districts to maintain rural voters in control; the substance of each statute is the same.

When one examines the contents of these laws the statewide statutory scheme or policy is clear. Votes of city residents are diluted by the same legislative policy on the sole basis of their residence in direct violation of the Equal Protection Clause as interpreted in *Reynolds* v. *Sims*, 377 U.S. 533. The Solicitor General in footnote 137 on page 128 of his Brief mentions the possibility of a "statewide interest" being involved if the statute here attacked is "similar in form to other statutes relating to the composition of county government . . . in other Alabama counties." We have examined the laws of Alabama relative to the districting and apportioning of Alabama's 67 counties and find that this is the fact. In 29 counties having a city of consequence located within their borders, the same "crazy quilt" malapportionment district system is used to insure rural voters control.[2] In 32 other counties the statutory scheme is for election at large of county board members but with a local residence requirement which insures rural control.[3] The other 6 rural counties elect their governing bodies on an at-large basis with no local residence requirement.[4]

The general powers of Alabama counties are largely the

[1] See Appendix A.
[2] See Appendix B.
[3] Ibid.
[4] Ibid.

same and are derived from the Alabama Constitution and various statutes.[5] Each county has a legislative act which prescribes the setup of its county board in such a way that the rural voters have the same "strangle hold" control over county government that they exercised in the Legislature prior to *Reynolds*.

This case therefore comes within both the letter of the three-judge statute and the decisions applying that statute to legislation or legislative policy of state-wide effect. *Ex Parte Collins*, 277 U.S. 569; *Rorick* v. *Board of Commissioners*, 307 U.S. 208; *Phillips* v. *United States*, 312 U.S. 246; *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218. The nature of the subject matter and the power exercised in these cases cited by the Solicitor General is entirely local: The paving of a single street in *Collins;* a Federal dam project in *Phillips;* bonds and taxes for a single drainage district in *Rorick;* a school system called by Mr. Justice Black "unique" to one county in *Griffin*, 377 U.S. at 228. But in this case the malapportionment of counties in Alabama is state-wide in fact, deliberately so to deprive city voters of full votes in electing county boards.

A further illustration of Alabama's state-wide policy is found on page 59 of the Record herein wherein the Legislature has districted Randolph County so that the City of Roanoke's 49% of the population of that County has only a 25% voice in that County's governing Board. One member of the County governing body represents the City of Roanoke's 9,500 people and three represent the 10,450 people who reside in the rural part of the County.

While the population figures differ in the counties of similar character, the policy of voter discrimination favoring

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[5] Brief for Appellants, p. 13, n. 7. See, also, Constitution of Alabama of 1901 (Code of Ala., Tit. 2, §1 *et seq* 1940) (Recomp. 1958), Art. II, Sec. 39; Art. IV, Sec. 88; Art. XII, Sections 222, 269.

rural residents contained in Alabama's applicable laws does not vary. Here power to reapportion counties is retained exclusively by the Alabama Legislature so it may maintain its state-wide "strangle hold" policy by so apportioning Alabama counties as to insure rural control of each county's governing board. This "strangle hold" is not a local matter but a matter of state-wide policy. It is this policy, as embodied in Act No. 9 for Houston County and the similar Acts for all other Alabama counties similarly situated (listed herein in Appendix A), that the complaint herein seeks to have this Court hold violative of the Constitution of the United States.

The basic three-judge state 28 U.S.C. § 2281, provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of *any state statute* by restraining the action of any officer of such state in the enforcement or execution of such statute . . . shall not be granted by a district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (underlining supplied)

28 U.S.C. § 1253 provides that:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

In *Phillips* v. *United States*, 312 U.S. 246, this Court said of § 266, section 2281's predecessor:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this court—requires *a suit which seeks to interpose the constitution against enforcement of a state policy*, whether such a policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an administrative board or commission. The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases." (underlining supplied) 312 U.S. at 251.

Unlike *Phillips*, which involved one specific Federal dam project, the complaint in this case involves "a suit which seeks to interpose the constitution against enforcement of a state policy." If upheld the complaint here "dooms" Alabama's state-wide "legislative policy" of using state apportionment power to keep counties where cities of consequence are located in control of rural voters of those counties by so apportioning the county that the rural voters have many times the voting power of the city residents. In the instant case more than 7 to 1.

In *Griffin* v. *School Board of Prince Edward*, 377 U.S. 218, 228, this Court said in part:

> ". . . What is attacked in the suit is not something which the state has commanded Prince Edward to do. . . . The case as it comes to us, concerns not a state-wide system but rather a situation unique to Prince Edward County. We hold that a single district judge did not err in adjudicating this present controversy."

Unlike *Griffin*, this case does concern a state statutory scheme, a "state-wide system" of malapportioning counties to so dilute city residents' votes that rural voters may control those counties with cities of consequence within their borders. The County of Houston's malapportionment situation is not "unique" to Houston.

In *Rorick v. Board of Commissioners*, 307 U.S. 208, this Court pointed out that the statute providing for bonds and taxes for a specified drainage district was not ". . . a statute which embodies a policy of statewide concern" and "Plainly, the matter here in controversy is not one of statewide concern but affects exclusively a particular district in Florida." 307 U.S. at 212. The difference in *Rorick* and the instant case is clear as here we do have a "statute which embodies a policy of statewide concern."

Mr. Justice Brandeis stated in *Ex parte Collins*, 277 U.S. 565, that § 266, which is § 2281's predecessor, "was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public . . ." He calls these "cases of unusual gravity." (277 U.S. at 567-69). *Collins* involved the paving of one city street.

The problem seems to be one of importance. Ordinances and statutes of only limited application are so rarely of the significance which would require the deliberation of three judges this Court has ruled that a three-judge court is unnecessary in such cases. See *City of Cleveland v. United States*, 323 U.S. 329, 332. This rationale, however, does not apply to this case, for the Alabama Statute here directly involved is part and parcel of a state-wide malapportionment statutory scheme or policy which flies in the teeth of the constitutional requirement of voter equality. Over the years, the policy of Alabama in regard to its Legislature, (described so vividly in *Reynolds v. Sims*, 377 U.S. 533) and for its counties where a city is located has been

one of extreme malapportionment. There is no doubt that the instant case, in the words of Justice Brandeis just quoted from *Collins*, involves a case of "special importance requiring special treatment in the interest of the public" or that this is a case "of unusual gravity."

An important reason why this case requires the "special treatment" of a three-judge federal court is that this Court has never definitively applied one-man, one-vote to the local governmental level. The decisions of the lower courts on this issue have been conflicting. While application of one-man, one-vote to the local level is a logical extension of the voter equality decisions of this Court's state legislative apportionment cases, such a step is a big one requiring the deliberation of three judges.

True it is that once this Court holds that county and municipal governing bodies must be fairly apportioned on a one-man, one-vote basis single-judge federal courts and state courts can determine whether a particular apportionment scheme complies with the holdings of this Court. *James and Company* v. *Morgenthau*, 307 U.S. 171, 172. See also *Bailey* v. *Patterson*, 369 U.S. 31, holding § 2281 inapplicable when a constitutional question is "settled beyond question" and is "foreclosed as a litigable issue," 369 U.S. at 33.

The Act here involved is a general type statute within the meaning of 28 U.S.C. § 2281 in that the powers of the malapportioned Houston Governing Board are expressed in general Alabama statutes and the Alabama Constitution.[6] The Houston Board has:

> 'All the general authority, power and duties now provided, or which may hereafter be provided to boards of revenue or commissioner courts, under the general laws of the State of Alabama." (R. 23)

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[6] See footnote 5, *supra*, and Appendices A and B.

The statutes listed in Appendix A confer similar power upon the counties there concerned.

Appendix C of this Brief contains a listing of the 165 officers and employees of Houston County.

Conclusion

The foregoing makes it quite clear that this statute is part of the statutory scheme for county government in Alabama—a scheme which embodies a state-wide policy of discrimination through malapportionment. The complaint herein was therefore "required" to be heard by a three-judge statutory court. Both the words "any state statute" and the intent of 28 U.S.C. § 2281 as construed by this Court so provide.

Respectfully submitted

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APPENDIX A

Statutory Provisions for Alabama Counties Which Elect County Governing Boards by Districts *

Blount County—Acts of Alabama 1963, Act No. 228, p. 628

Butler County—Acts of Alabama 1957, no. 37, p. 83

Calhoun County—Acts of Alabama 1951, no. 686, p. 1183

Chambers County—Acts of Alabama 1959, no. 69, p. 470

Cherokee County—Local Acts of Alabama 1939, no. 250, p. 138

Choctaw County—Local Acts of Alabama 1926, no. 120, p. 41

Covington County—Local Acts of Alabama 1945, no. 22, p. 23

Crenshaw County—Alabama Laws 1878-79, Act no. 177, p. 203

Dallas County—Alabama Acts 1900, Act no. 328, p. 890

Dale County—Alabama Acts 1896, Act no. 161, p. 378

Elmore County—Local Acts Alabama 1915, Act no. 466, p. 373

Escambia County—Acts of Alabama 1963, Act no. 43, p. 211

Fayette County—Local Acts of Alabama 1911, Act no. 57, p. 20

Geneva County—Alabama Laws 1894-5, Act no. 544, p. 1136

Lamar County—Alabama Laws 1878-79, Act no. 177, p. 208

Lauderdale County—Acts of Alabama 1955, no. 39, p. 61; Acts of Albama 1953, no. 61, p. 89

Limestone County—Acts of Alabama 1951, no. 434, p. 785 (establishing districts)

Madison County—Local Acts 1931, no. 469, p. 232; Local Acts 19, no. 19, p. 3

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* These statutory citations were obtained from volumes in the Law Division of the Law Library of Congress and are believed to be accurate. Because some are so very ancient we asked the Secretary of State of Alabama to check this list against his official records. His response was not received in time for inclusion in this Brief.

Marion County—Local Acts of Alabama 1947, no. 633, p. 403
Monroe County—Local Acts of Alabama 1934, no. 211, p. 109
Pickens County—Local Acts of Alabama 1923, Act no. 156, p. 76
Randolph County—Local Acts of Alabama 1949, Act no. 688, p. 1064
St. Clair County—Acts of Alabama 1959, no. 214, p. 753; Act of Alabama 1957, no. 481, p. 663
Talladega County—Acts of Alabama 1951, no. 544, p. 955
Tallaposa County—Alabama Acts of 1963, no. 43, p. 211
Walker County—Alabama Acts 1957, Act no. 118, p. 166
Jackson County—Acts of Alabama 1950, no. 65, p. 126

APPENDIX B

United States Department of Commerce, Bureau of Census, State and Local Government Special Studies: No. 49, Governing Boards of County Governments: 1965, pages 14-15.

Table 5.—Number of Members of County Governing Boards, by Method of Selection, for County Governments, by States: 1965

Item	Members per county					
	Total	Selected at large	Selected at large with local-area residence requirement	Selected from local areas		
				Districts	Townships	Municipalities
ALABAMA (67 counties)						
Summary by size of board:						
7 members—1 county	7	1	6	—	—	—
6 members—2 counties	6	1	—	5	—	—
5 members—55 counties:						
23 counties	5	1	—	4	—	—
19 counties	5	1	4	—	—	—
8 counties	5	—	5	—	—	—
3 counties	5	—	—	5	—	—
1 county	5	5	—	—	—	—
1 county	5	1	4	—	—	—
4 members—2 counties	4	4	—	—	—	—
3 members—7 counties:						
3 counties	3	3	—	—	—	—
3 counties	3	—	3	—	—	—
1 county	3	1	—	2	—	—
Individual counties:						
Autauga	5	1	4	—	—	—
Baldwin	4	4	—	—	—	—
Barbour	7	1	6	—	—	—
Bibb	5	1	4	—	—	—
Blount	5	1	—	4	—	—
Bullock	5	1	4	—	—	—
Butler	5	1	—	4	—	—
Calhoun	3	1	—	2	—	—
Chambers	5	1	—	4	—	—
Cherokee	5	1	—	4	—	—
Chilton	5	1	4	—	—	—
Choctaw	5	1	—	4	—	—
Clarke	5	1	—	4	—	—
Clay	5	1	4	—	—	—
Cleburne	5	1	4	—	—	—

Table 5.—Number of Members of County Governing Boards, by Method of Selection, for County Governments, by States: 1966

Item	Members per county					
	Total	Selected at large	Selected at large with local-area residence requirement	Selected from local areas		
				Districts	Townships	Municipalities
ALABAMA—Continued						
Individual counties—Continued						
Coffee	5	1	4	—	—	—
Colbert	5	—	5	—	—	—
Conecuh	5	—	5	—	—	—
Coosa	5	1	4	—	—	—
Covington	5	1	—	4	—	—
Crenshaw	5	1	—	4	—	—
Cullman	3	3	—	—	—	—
Dale	5	1	—	4	—	—
Dallas	5	1	—	4	—	—
DeKalb	5	—	5	—	—	—
Elmore	5	1	—	4	—	—
Escambia	5	—	—	5	—	—
Etowah	5	—	5	—	—	—
Fayette	5	1	—	4	—	—
Franklin	5	1	4	—	—	—
Geneva	5	1	—	4	—	—
Greene	5	1	4	—	—	—
Hale	5	1	4	—	—	—
Henry	5	1	4	—	—	—
Houston	6	1	—	5	—	—
Jackson	5	—	5	—	—	—
Jefferson	3	3	—	—	—	—
Lamar	5	1	—	4	—	—
Lauderdale	5	1	—	4	—	—
Lawrence	5	—	5	—	—	—
Lee	5	1	4	—	—	—
Limestone	5	1	—	4	—	—
Lowndes	5	5	—	—	—	—
Macon	5	1	4	—	—	—
Madison	5	1	—	4	—	—
Marengo	5	—	5	—	—	—
Marion	5	—	—	5	—	—
Marshall	5	1	4	—	—	—
Mobile	3	3	—	—	—	—
Monroe	5	1	—	4	—	—
Montgomery	5	—	5	—	—	—
Morgan	5	1	4	—	—	—
Perry	5	1	4	—	—	—
Pickens	5	1	—	4	—	—
Pike	5	1	—	4	—	—
Randolph	5	1	—	4	—	—
Russell	3	—	3	—	—	—
St. Clair	5	1	—	4	—	—

Table 5.—Number of Members of County Governing Boards, by Method of Selection, for County Governments, by States: 1965

Item	Members per county					
	Total	Selected at large	Selected at large with local-area residence requirement	Selected from local areas		
				Districts	Townships	Municipalities
ALABAMA—Continued						
Individual counties—Continued						
Shelby	5	1	4	—	—	—
Sumter	3	—	3	—	—	—
Talladega	5	1	—	4	—	—
Tallapoosa	6	1	—	5	—	—
Tuscaloosa	4	4	—	—	—	—
Walker	5	—	—	5	—	—
Washington	5	1	4	—	—	—
Wilcox	5	1	4	—	—	—
Winston	3	—	3	—	—	—

APPENDIX C

Officers and Employees of Houston County, Alabama
(Compiled from official County records)

		Total
Probate Office		
Probate Judge	1	
Chief Clerk	1	
5 Reg. Clerks	5	7
Tax Assessor Office		
Tax Assessor		
Chief Clerk	1	
Clerk	1	
Ex. Clerk	1	3
Tax Collector Office		
Tax Collector	1	
Chief Clerk	1	2
Registers Office		
Register	1	
Chief Clerk	1	2
Circuit Clerk Office		
Cir. Clerk	1	
Chief Clerk	1	
Clerks	2	4
District Attorney		
Secretary	1	1
Circuit Judge Office		
Circuit Judge	1	
Secretary	1	
Court Reporters	2	4
Sheriff Office		
Sheriff	1	
Chief Deputy	1	
Deputies	5	
Bookkeepers	2	
Jailors	3	12
Coroner Office		
Coroner	1	1
County Attorney		1
Maint. Engrs. Courthouse		1
County Solicitor		1
Typhus Control Office		
Clerk	1	
Laborers	4	5
Board of Revenue Members		5
Accounting Dept.		3
Judge Law & Equity Court		1
Custodian Voting Machines		1
Custodian Farm Center		1
Bailiffs		2
Janitors		6
Total Courthouse		63

Officers and Employees of Houston County, Alabama
(Compiled from official County records)

Road & Bridge Dept.		
County Engineer	1	
Asst. Co. Engineer	1	
Clerks	3	
Shop Crew	4	
Others	93	
Total		102